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New Private Law Theory and Tort Law: A Comment

Keith N. Hylton*

January 2012

Abstract: This comment was prepared for the Harvard Law Review symposium on “The New Private Law”, as a response to Benjamin Zipursky’s principal paper on torts. I find Zipursky’s reliance on Cardozo’s *Palsgraf* opinion as a foundational source of tort theory troubling, for two reasons. First, Cardozo fails to offer a consistent theoretical framework for tort law in his opinions, many of which are difficult to reconcile with one another. Second, *Palsgraf* should be understood as an effort by Cardozo to provide greater predictability, within a special class of proximate cause cases, by reallocating decision-making power from juries to judges. It was almost surely not an effort to set out a nonconsequentialist theory of tort law. While I agree with some of the goals of the new private law movement, much work remains to be done, within the methodological approach championed by Zipursky, in constructing a rigorous theoretical framework.

* Boston University, knhylton@bu.edu. This comment will be published, with other comments on “The New Private Law” symposium papers, in an upcoming issue of the Harvard Law Review Forum, 2012. I thank Adam Mayle for research assistance.

If the title of this symposium, “The New Private Law,” was framed to capture the common thread running through the principal papers, then I gather it refers to an approach that takes legal doctrine seriously and at the same time disdains the consequentialism that has dominated private law theory in the last three decades. As a thoroughgoing consequentialist I am a bit troubled by this approach, but my personal views should not matter to legal scholars who are attempting to assess the value of the new private law scholarship. The important question is whether new private law theory “advances the ball” by providing a better understanding of the policies that shape private law.

My main area of specialization in private law is torts. My reward for this specialty is to have been invited to comment on the principal paper on torts in this symposium, Ben Zipursky’s contribution. Zipursky’s paper on tort law fits well within the approach of the other principal symposium papers in its focus on important strands of case law and its professed rejection of consequentialism.

Before getting to my criticisms of Zipursky’s contribution, I would like to note the important and vast areas of agreement that I have with him. First, Zipursky says that “New Private Law Theory is founded on the idea that legal scholars must do both,”¹ referring to the need to “do theory” and to “do law” at the same time. On this point, Zipursky and I could not be more in agreement. We see ourselves as among a rather small group of scholars who take the law seriously, in the sense of paying close attention to legal doctrine, and at the same time attempt to bring in insights from theoretical fields – in Zipursky’s case philosophical arguments, in my case economics-based arguments.

“Doing both”, in the sense that Zipursky means, is not easy, and the incentives to do so are poor. Doing both – combining a close analysis of the law with insights from some field of theory – is difficult because one has to avoid violating scholarly norms in different fields of inquiry. It is quite easy to conduct a purely legal analysis that violates default assumptions or modeling methods (e.g., rational conduct) in economics. A legal scholar who attempts to apply economic analysis has to remain aware of the expectations of a rigorous argument in the economics field. At the same time, the scholar cannot go to the other extreme and attempt to address interesting questions in economics that have no bearing on legal doctrine or its function.

The incentives to do both are poor, also. Try it, and you will see. Good scholarship that integrates economic analysis with law will often be rejected by legal scholars on the ground that it is “not law”. I have always found this to be strange because economic analysis can be used to understand the law more deeply than an approach that involves little more than the interpretation of language. On the other hand, economists are quite quick to reject economic analysis that hews closely to legal doctrine on the ground that it is insufficiently theoretical, or excessively *ad hoc*. As a result, the interdisciplinary

¹ Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. (forthcoming 2012).

scholar who attempts to “do both” will sometimes find himself shut out of both fields – law and the related theoretical field.

If the “New Private Law Theory” is a movement that aims to provide a protective shelter for scholars who attempt to merge law with some field of theoretical analysis, then I am all in favor of it. I will work tirelessly to help promote it, even if it means holding back on criticism of other scholars within the private law theory movement.

The other vast area of agreement concerns the concept of duty in tort law. John Goldberg and Ben Zipursky have put a great deal of effort, over more than a decade, in combating the Holmesian (and Prosserian) skepticism toward duty doctrine.² They have argued that the concept of duty plays an important role in tort law, and should not be treated as an afterthought in efforts to explain or synthesize tort law.³

I agree with the view that duty plays an important role in tort law. My approach has been to use economic analysis to explain the functions of duty doctrine in tort law.⁴ I have argued that duty doctrine serves several functions: subsidizing desirable conduct (e.g., rescue), supporting property rules, channeling liability to the cheapest cost avoider.⁵ As a general matter, while negligence doctrine aims to regulate precaution, duty doctrine attempts to regulate activity levels – i.e., the frequency with which actors engage in conduct that imposes risk on others.

With these vast and important areas of agreement in mind, I will now switch focus to my criticisms of Zipursky’s paper. Although most of what I will say is critical from this point forward, I hope that it will provide constructive suggestions to new private law theory scholars, a group in which I should consider myself a member if my most generous understanding of their goals is correct.

My first criticism is Zipursky’s heavy reliance on Cardozo’s *Palsgraf*⁶ opinion as a foundational source of tort law theory. Like every tort scholar, I am impressed by Cardozo’s style of argument and his mastery of law. However, there are limits to the usefulness of *Palsgraf* as a theoretical template for tort law.

When a scholar attempts to build on Cardozo as a source of theory for some area of law, especially tort law, I think the scholar first has to confront the question: which Cardozo? Cardozo’s opinions are brilliant and technically impressive, but they are sometimes not easy to reconcile with one another, and often leave less in the form of structure than what may appear at first glance.

² See, e.g., John. C. P. Goldberg & Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 Vand. L. Rev. 647 (2001).

³ Id.

⁴ Keith N. Hylton, Duty in Tort law: An Economic Approach, 75 Fordham Law Review 1501 (2006).

⁵ Id. at 1501-1502.

⁶ *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).

The “which Cardozo?” problem comes through in many of his opinions. Should a tort scholar who plumbs for theory use the Cardozo of *Palsgraf* or the Cardozo of *Pakora*?⁷ Or should he look to the Cardozo of *Macpherson*,⁸ or the Cardozo of *Moch*?⁹ Or, how about the Cardozo of *Glanzer*?¹⁰ In these different Cardozo opinions, we come across very different versions of Cardozo the legal theorist, some of them difficult to reconcile with others. It is easy to walk away with the impression that Cardozo did not have a clear theoretical framework in mind himself; that he sort of felt his way toward the solution, using pieces of established doctrine here and there, like a person trying to get out of a dark room by grabbing onto one piece of furniture after another.

Take, for example, the comparison of *Palsgraf* to *Pakora*. In *Palsgraf*, Cardozo held that a tortfeasor does not have a duty to a victim that is not foreseeable. In Cardozo’s own words, “the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.”¹¹ In another passage Cardozo says “The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”¹²

Obviously we can argue about the meanings of the phrases in Cardozo’s opinion. One could argue, as Zipursky does, that Cardozo is really not saying anything about duty in connection to foreseeability; he is saying that even if you have a duty, you will not breach that duty unless the victim is foreseeable. This is just playing with words. It does not matter whether we say that the actor does not have a duty to a nonforeseeable victim, or if we say that he does not breach the duty to the victim if the victim is not foreseeable. The result is the same under both formulations. The consequentialist movement in private law has been in part an effort, from Bentham to the present, to get us away from wasting time with verbal games. If new private law theory takes us back to the days when such practices were common in legal theory, then it will prove itself unhelpful.

Cardozo’s *Palsgraf* opinion offers a straightforward rule on proximate causation. It is largely a sensible rule, and it is consistent with the vast bulk of tort doctrine. In this sense *Palsgraf* illustrates one of Cardozo’s gifts; his ability to take seemingly complicated questions in law and offer simple rules that convey a clear message to courts. His opinion on the duty to rescuers, *Wagner*,¹³ is another example of Cardozo’s ability to offer simple, pithy rules (“danger invites rescue”¹⁴) that convey the basic sense of the courts over a set of complicated cases.

Zipursky, citing Cardozo, suggests that the *Palsgraf* opinion is not about proximate cause. Really? If it is not about proximate cause, what is it about? As Zipursky notes, Cardozo himself says that *Palsgraf* is not about proximate cause. Cardozo informs the

⁷ *Pakora v. Wabash Ry.*, 292 U.S. 98 (1934).

⁸ *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

⁹ *Moch v. Rensselaer Water Co.*, 159 N.E. 896 (1928).

¹⁰ *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

¹¹ *Palsgraf*, 162 N.E. at 100.

¹² *Id.*

¹³ *Wagner v. International Ry.*, 133 N.E. 437 (N.Y. 1921).

¹⁴ *Id.* at 437.

reader near the end of his opinion that “The law of causation, remote or proximate, is thus foreign to the case before us.”¹⁵ What are we to make of these statements?

The first thing to say is that *Palsgraf* is obviously a case about proximate cause. Proximate cause typically involves an inquiry into foreseeability, as a necessary condition for liability. Cardozo’s *Palsgraf* opinion is an analysis of foreseeability. This is generally recognized among the casebook writers; most torts textbooks cover the case in the chapter on proximate cause. Prosser’s torts hornbook discusses *Palsgraf* in the chapter on proximate cause.¹⁶

Cardozo’s key contribution to proximate cause analysis in *Palsgraf* was to state a legal rule on proximate causation that bears on the actor’s duty. In other words, *Palsgraf* elevates the proximate causation question to the duty phase of the negligence analysis. In the standard analysis of negligence, proximate cause is a question that is tightly bound up with the factual determination of a breach of the legal standard and typically within the province of the jury. Cardozo set out to extract a particular proximate cause question from the jury’s control and to put it squarely in the hands of judges. On the particular proximate cause question analyzed in *Palsgraf*, Cardozo is saying that judges can make the decision without consulting the jury.

In other words, the way to understand *Palsgraf* is to see that it was a power play. Cardozo took a question away from the jury, weakening the jury and enhancing the power of the judge. The reason for doing so was to create greater certainty in the law. Cardozo presumably was concerned that the foreseeable victim question, if left in the hands of juries, could generate inconsistent and unpredictable decisions. *Palsgraf* itself is an example. It was a case that raised serious proximate causation questions, but the trial court had left the issue entirely in the hands of the jury, and the jury returned a verdict for the plaintiff against the defendant railroad. The Appellate Division of the Supreme Court in New York, looking at the case before it reached Cardozo on the highest New York court, split votes on the question of proximate causation. When *Palsgraf* reached Cardozo, he saw an opportunity to craft a simple rule guiding lower courts on similar matters of proximate causation. On this score, I think he was successful in crafting the rule, though I have no empirical evidence suggesting that the law became more predictable after Cardozo’s opinion.

Cardozo’s strange comment that proximate causation is “foreign” to *Palsgraf* should be understood in terms of this power-play analysis. It would have been too obvious a power reallocation if Cardozo had said that this was a case about proximate cause. It would have been a clear signal, then, that he was taking an issue away from juries and giving it to judges. Some courts may have objected to such a sharp break with established doctrine. It would have been wiser, strategically, to assert that the issue had never been within the jury’s control to begin with, which explains Cardozo strange comment.

¹⁵ *Palsgraf*, 162 N.E. at 101.

¹⁶ William L. Prosser, *Handbook of the Law of Torts* 254-260 (1971).

I must return to the issue that set me on this path: the conflicting opinions by Cardozo, and specifically the comparison of *Palsgraf* with *Pakora*. *Pakora*, a case that law students see in their first year of torts, is largely a response to Holmes's opinion in *Goodman*.¹⁷ Holmes argued in *Goodman* that cases involving contributory negligence at railroad crossings needed to be settled under a simple rule. He offered the "stop, look, and listen" rule, which held that a tort victim who failed to stop at the crossing, look for the train, and listen for it, is guilty of contributory negligence as a matter of law. Holmes, like Cardozo in *Palsgraf*, wanted to set out a clear rule that would make the law more predictable in the frequent rail-crossing accidents, though Holmes's rule was not followed consistently in the lower courts.

In *Pakora*, Cardozo rejected the stop, look, and listen rule.¹⁸ He noted that the rule could be counterproductive in some settings.¹⁹ Someone could stop, get out of his car, and look for the train, and then find that the train has suddenly appeared, bearing down on him, as he starts across the tracks.²⁰ More interestingly, Cardozo attacks the notion that judges could frame simple rules of law that control jury decisions, and suggests that heavily fact-bound negligence questions should always be within the province of the jury.²¹

I find it funny that Cardozo would be so dismissive of Holmes's effort to set up a predictable rule governing a messy, fact-bound area of tort litigation, when in an earlier case, *Palsgraf*, he had sought to do the same thing, for the same reasons as Holmes. I have no clue what explains the different versions of Cardozo reflected in the *Palsgraf* and *Pakora* opinions. *Palsgraf* precedes *Pakora*, so one possible answer is that *Pakora* reflects an older Cardozo who had grown suspicious of efforts by judges to take questions from juries. Perhaps he began to think, as he got older, that judges know a bit less than they think they do. Given the humility that sometimes comes with age, he may have changed his views from the time when he decided *Palsgraf*. Whatever the reason, the Cardozo of *Palsgraf* is different from the Cardozo of *Pakora*. The Cardozo of *Palsgraf* is a confident Holmesian positivist. The Cardozo of *Pakora*, skeptical of positivism, is a secular natural law theorist.

Given the fundamental differences in perspective reflected in the *Palsgraf* and *Pakora* opinions, I would advise any scholar to be wary of relying on either of those opinions as the source of a general framework for tort law. I doubt that Cardozo himself thought that he was setting out a deep framework for tort law in his *Palsgraf* opinion; my suspicion is that he set out to solve a rather narrow but important problem concerning the power of the judge relative to that of the jury. Any scholar who sets up the Cardozo of *Palsgraf* as the source of a general theory of tort law is bound to be embarrassed by the contradictions in Cardozo's other opinions. If Cardozo thought that he was setting out a general theory of tort law in *Palsgraf*, why wouldn't he attempt to stick with the theory in

¹⁷ *Baltimore and Ohio R.R. v. Goodman*, 275 U.S. 66 (1927).

¹⁸ See *Pakora*, 292 U.S. at 103.

¹⁹ See *id.* at 104-05.

²⁰ See *id.*

²¹ See *id.* at 105-06.

later opinions? Wouldn't he at least try to explain why he would choose an inconsistent approach in a later opinion?

Zipursky asserts that *Palsgraf* is “the canonical case of first-year Torts”.²² I disagree. Indeed, given the views expressed in *Pakora*, I think Cardozo would have rejected the assertion as well. *Palsgraf* is an important case, but its rule, understood in light of the facts of the case, is consistent with the proximate causation case law. The dissenting judge of the Appellate Division argued that the plaintiff's negligence case failed because there were unforeseeable intervening factors between the railway's negligence and Mrs. Palsgraf's injury. In other words, *Palsgraf* can easily be understood in terms of the traditional analysis of intervening factors – and there presumably was a sufficient body of case law on proximate cause at the time of the *Palsgraf* decision to justify an appellate court's decision to overturn, on proximate cause grounds, the trial court's finding of negligence. Cardozo's opinion tries to provide a simple short cut to the answer for cases with similar facts. But it is a short cut that is useful largely in explaining the outcome, not in conducting the analysis itself.

Since I have gotten so far into the discussion of *Palsgraf*, I may as well continue on to Zipursky's analysis of the case. I could focus on several statements, but I'll choose this one: “I have elsewhere documented a vast body of tort law that supports this general principle as a doctrinal matter, arguing that Cardozo is in fact correct doctrinally that tort doctrine does not permit claims based on wrongs that are not wrongs to the plaintiff herself.”²³ In other words, if the harm is to herself, the plaintiff can bring a tort action. If the harm is to someone else, or if it is not harm to anyone, tort doctrine does not provide a recovery.

As a general matter, I do not find the proposition that tort doctrine “does not permit claims based on wrongs that are not wrongs to the plaintiff herself” controversial at all. But the proposition as worded begs various questions of interpretation. What does it mean to say “wrongs that are not wrongs to the plaintiff herself”?

The question is how a plaintiff – or a court, or anyone for that matter – should determine if the wrong was to herself, or to someone else. Zipursky's answer to this question is that the plaintiff can bring a tort action against the injurer if the injurer has a duty to the plaintiff. So how do we know if the injurer has a duty to the plaintiff?

The answer given by Cardozo, as well as in standard tort doctrine, is that the injurer may have a duty to the plaintiff if the plaintiff is a foreseeable victim. Actually, it is a bit more complicated than that because the proximate causation case law demonstrates that foreseeability is a necessary condition, but not a sufficient condition for liability.

In any event, once we start to unpack the proposition that Zipursky stresses in his discussion of *Palsgraf*, we see that it comes down to foreseeability. Duty, in Cardozo's analysis, is determined by foreseeability. Given this, why don't we apply Occam's Razor

²² Zipursky, *supra* note 1.

²³ *Id.*

and just say that liability depends on foreseeability? Once we reduce the argument by getting rid of the unnecessary verbiage, we find ourselves back to the position that Holmes took in *The Common Law*;²⁴ that foreseeability is the core issue in determining whether an actor whose conduct leads to an injury to someone should be held responsible for the victim's injury.²⁵

Zipursky would have us shift the focus from foreseeability to duty. It should be clear that Cardozo's *Palsgraf*, with its emphasis on foreseeability as the source of duty, provides no support for this argument.

Moreover, while I think duty doctrine serves important functions, and have offered a detailed utilitarian theory of its functions,²⁶ I do not think that the concept of duty has a special pivotal importance in tort law. While foreseeability plays a central role in tort law, as Holmes stressed, duty plays a less important role. Duty doctrine enables courts to solve various practical problems that remain after foreseeability analysis has done the main work in regulating conduct under tort law. Duty doctrine ties up loose ends, as it were, or sweeps up the field after the game has been played. But duty doctrine does not play the central role as a source of norms for regulating conduct.

To be specific, duty doctrine plays a role somewhat similar but opposite that of strict liability.²⁷ The function of strict liability in tort law is to internalize losses, so that actors will reduce the scale of their activities, closer to socially optimal levels. Duty doctrine, when it relieves an actor of the duty of care, serves several specific functions, but an important one is to encourage or subsidize activities that are beneficial to society (e.g., subsidizing rescue efforts).²⁸ In a sense, strict liability typically functions as a tax on activities while duty (specifically, the absence of a duty) often functions as a subsidy or liability shield.²⁹

Zipursky suggests that *Philip Morris v. Williams*³⁰ is a case that illustrates the proposition he draws from *Palsgraf*; specifically, that tort doctrine does not permit a plaintiff to sue for wrongs that are not personal to the plaintiff. In *Philip Morris*, the Supreme Court held that harms to third parties could be taken into account in the reprehensibility analysis in a case involving a claim for punitive damages, but that those third-party harms could not be addressed directly in the quantum of damages awarded.³¹ Put another way, if the injurer's conduct threatened a similar level of harm to 100 people, the aggregate harm can be considered as a factor in increasing the punitive award in a particular case of harm to a victim – because greater aggregate potential harm implies greater reprehensibility. But it is impermissible for a court to explicitly multiply the damage award to the victim

²⁴ Oliver Wendell Holmes, *The Common Law* (Little, Brown and Co., 1881).

²⁵ *Id.* at 89-96.

²⁶ Hylton, *supra* note 4.

²⁷ *Id.* at 1504.

²⁸ *Id.* at 1514.

²⁹ *Id.* at 1502.

³⁰ 549 U.S. 346 (2007).

³¹ See *id.* at 355.

by a factor of 100 for the express purpose of punishing the injurer by an amount that reflects the compensation awards to all of the potential victims.

I suppose if you try hard, you can offer a reasonable-sounding story to reconcile Cardozo's *Palsgraf* with *Philip Morris*. It would run roughly as follows. Cardozo said in *Palsgraf* that you do not owe a duty to a victim that cannot be foreseen – or, alternatively (using Zipursky's language), a failure to take care is not a breach of duty to the nonforeseeable victim. From this proposition one might argue that a nonforeseeable victim is a third-party, as far as the relationship between the victim and tortfeasor goes. The next step of the argument is that you do not owe a duty to any third party, in so far as that third party is outside of the foreseeability nexus that links the injurer and the victim. From this claim, one could argue that a punitive award should not include compensation for a third party, since the injurer could not have owed a duty to the third party. Why should the injurer be forced to pay an award that punishes him for harm to someone to whom he does not owe a duty of care?

It should be clear that the argument I just rehearsed is flawed in many respects, and not because I tried to set it up as a straw man. The key flaw in the effort to reason by analogy from *Palsgraf* to *Philip Morris* is that the notion of foreseeability gets lost once we get to the end-point of the analogy at *Philip Morris*. Cardozo's notion of duty hinges on foreseeability. This is true whether one adopts the verbal formulation of "no foreseeable victim means no duty" or "no foreseeable victim means no breach of duty". Whatever the verbal formulation, if one is going to be consistent with Cardozo, the concept of foreseeability has a controlling effect on the argument.

Now let's walk to the end-point this analogy at *Philip Morris*. Does the proposition of *Philip Morris* apply to third parties as implied by the Cardozo argument (rehearsed above) or as implied by the dictionary (anyone other than the injured victim)? The Supreme Court's opinion does not address this question. However, by not addressing the question, the Court invites the inference that the term "third party" is used in the sense implied by the dictionary. That is inconsistent with the theory of *Palsgraf*.

To be clear, consider a case in which the injurer's conduct threatens harm to 100 people. Only one is injured. For example, suppose the injurer sprays a dance hall crowded with 100 people full of bullets from a machine gun. Miraculously, only one of the attendants is injured. Are the other 99 potential victims "third parties" in the sense of being outside of the foreseeability nexus between the injurer and the single injured victim? No. Indeed, all 100 of the potential victims are foreseeable victims. Under the theory of *Palsgraf*, the injurer breached his duty of care to all of the 100 potential victims. Any other answer would involve the absurdity of saying that the injurer, by firing a machine gun in a crowded dance hall, breached his duty of care only with respect to the single injured victim.

Continuing with the dance hall hypothetical, are the other 99 potential victims "third parties" under the definition of *Philip Morris*? The only answer apparent from the Court's opinion in *Philip Morris* is yes. Perhaps in years from now the court will modify

the views expressed in *Philip Morris* and hold that the third parties it referred to in that case are those outside of the foreseeability nexus, but until that happens we are stuck with the dictionary definition of third party in reading *Philip Morris*. Under this interpretation, *Philip Morris* leads to a result that contradicts *Palsgraf*. A third party under the reading of *Philip Morris* is not necessarily a third party under the reading of *Palsgraf*. Thus *Palsgraf* does not support the Court's reasoning in *Philip Morris*.

One could retreat from an effort to link *Palsgraf* and *Philip Morris* by arguing that *Palsgraf* deals with substance while *Philip Morris* deals with procedure. *Palsgraf*, as Zipursky suggests, provides a theory of "substantive standing" for plaintiffs in tort actions. *Philip Morris*, on the other hand, addresses only the question whether a defendant in a tort action can be required to pay a penalty that reflects the harm to someone who is not the actual plaintiff. *Philip Morris* offers a *per se* procedural rule: it is a *per se* violation of procedural due process to enhance a damage award for the express purpose of including a component that would compensate a third party who is not before the court.

Such an argument merely takes us further into the tangled weeds, rather than in the direction of enlightenment. First, it is not at all clear that *Philip Morris* is a purely procedural holding, in spite of the Court's characterization of it as such. The decision tries, though unsuccessfully, to announce a ceiling on punitive damages awards. The ceiling, if it were to be applied, would effectively ban multipliers applied to compensatory damages as a method of calculating punitive awards. One could easily argue that this is a substantive decision because it attempts to control the outcome of the case – i.e., how high is the award – rather than the procedure by which that outcome is reached.

Indeed, I think the only good reason for viewing *Philip Morris* as procedural rather than substantive is that the decision is ineffective at reaching its substantive goal of capping damages. Announcing a ban on the use of multipliers applied to compensatory awards does not have the same effect as announcing a ceiling or cap on punitive awards. Courts are not restrained under *Philip Morris* to issue an award within any particular numerical limit, though the earlier weak substantive limits implied by *BMW v. Gore*³² and by *State Farm v. Campbell*³³ presumably still remain in effect.

The second reason the substantive-versus-procedural distinction merely takes us further into tangled weeds, in an effort to claim kinship between *Palsgraf* and *Philip Morris*, is that the distinction amounts to an admission that *Palsgraf* and *Philip Morris* are completely different cases. The theoretical connection between the two is tenuous at best. Cardozo's effort in *Palsgraf* was to simplify a messy area of doctrine involving proximate cause, a topic that is at the core of tort law, and at the core of the relationship between the judge and the jury. *Philip Morris* is a theoretically underdeveloped, and ultimately unsuccessful, attempt by the Supreme Court to regulate the decision-making processes of courts – i.e., of judges as well as juries. *Philip Morris*, unlike *Palsgraf*, does

³² See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

³³ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

not find its basis in a well-developed body of case law. It is an attempt to displace state-court decision processes with a new framework based on a largely speculative connection to constitutional due process concerns.

I have so far argued that the reasoning of *Palsgraf* does not support the proposition adopted by the Court in *Philip Morris*. The other argument to consider is whether the proposition of *Philip Morris* can be justified on the basis of *Palsgraf*. This argument would run as follows. If a court were to multiply a compensatory damages award in order to arrive at a punitive judgment, it would impose a penalty on a defendant that would punish the defendant for harms to third parties, and as to some of whom the defendant may not have owed a duty of care. *Philip Morris* takes the position that this is a plausible outcome, and that it would constitute a taking that violates the Constitution. One could further argue that it violates *Palsgraf* by forcing the defendant to pay a penalty based on harm to a victim to whom he did not owe a duty of care. This argument raises several questions.

First, must a *penalty* be justifiable on the ground that it reflects the correct level of damages that would be paid to victims in group litigation? This is a theoretical question, the answer to which the Court in *Philip Morris* implicitly assumes is affirmative. But there is no theoretical or empirical basis for the court's implicit assumption. A penalty is designed *to punish and to deter*. If the defendant's conduct is reprehensible, as courts require in order to support a punitive judgment, then the primary goal of punishment should be to deter, not to provide the correct level of loss internalization based on some notion of group punishment. Thus, if the penalty imposed on a defendant is based on a multiplier applied to compensatory damages, that information by itself should not lead us to question the size of the penalty. The proper question is whether the penalty is appropriate for deterrence purposes.

Second, is it plausible that a court, when applying a multiplier to compensatory damages, would issue a punitive award that effectively forces the defendant to pay for harms to victims to whom the defendant did not owe a duty? Although this is theoretically possible, it is highly unlikely. In order to be found liable for a punitive award, the court must find first that the defendant's conduct was reprehensible. The dance hall hypothetical that I provided earlier provides a suitable example of reprehensible conduct. If the defendant's conduct is reprehensible and it threatens harm to many people, then the defendant most likely has violated his duty of care *to everyone within the zone of foreseeable risk from his conduct*. A punitive award issued under these conditions would not contravene the policy of *Palsgraf*.

Still, it remains possible that although the defendant has violated his duty of care with respect to a large set of victims (or potential victims), a court might find that the defendant does not owe damages to a particular subset of the victims because their conduct excludes them from the set of victims eligible for compensation. For example, some of the victims may have consented to the defendant's seemingly reprehensible conduct.

There are several solutions to this “problem”. The first is to realize that compensation and deterrence are not the same goals. The relevant question in a punitive damages case is whether the penalty is sufficient to deter, given the findings of reprehensible conduct. If there is no uncertainty as to the reprehensibility of the defendant’s conduct, then there is no reason to second-guess the punitive damages verdict on the basis of its tendency to force payment for harms to victims who would be ineligible to receive compensation.

The second solution is to realize that in the special set of cases in which this could be an issue, the easiest procedural fix is to permit the defendant to lay out his evidence for a reduction in the punitive award. The special case in which this might be necessary is where the reprehensibility of the defendant’s conduct is not clear under all of the circumstances observed in the case or with respect to all of the potential victims. In this special case, the defendant should be permitted to come to court with evidence that there exists a subset of victims who would be ineligible for compensation. This is a solution that clearly would be procedural, in contrast to the approach taken in *Philip Morris*.

In the end, the link between *Palsgraf* and *Philip Morris* is most seriously undermined by the ineffectiveness of the Court’s decision in *Philip Morris*. During the symposium discussion, I referred to *Philip Morris* as a vacuous opinion. I view the decision as vacuous in the sense that it has no practical impact on the decision-making processes of courts in punitive damages cases. Suppose a court decides, after a defendant has been convicted of a reprehensible tort, that a multiplier approach is the best way to determine the proper punitive award. For example, suppose the defendant’s reprehensible conduct threatened harm equal to \$100 to each one of 100 potential victims, and only one victim was actually injured. If the court uses the multiplier approach, it would take the \$100 damage judgment and multiply it by 100 to arrive at a total award of \$10,000. This implies that the compensatory award to the one victim who sues would be \$100 and the punitive award would be \$9,900. After deciding that the proper total award is \$10,000 the court reads the *Philip Morris* decision and realizes that this procedure of calculating the punitive award is a due process violation. What would the court do? Since the court has already decided that the \$10,000 award is the appropriate level for deterrence purposes, it is unlikely to change its view on the deterrence policy just because of the *Philip Morris* opinion, which has nothing to say about deterrence policy. The court will also realize that *Philip Morris* does not prevent it from issuing a \$10,000 punitive award; the decision only prevents the court from *saying* that its award is based on a multiplier applied to a compensatory award. The rational strategy for the court is to continue on its course to issue the \$10,000 damage award, but to avoid justifying the award by any reference to the multiplier approach. The court’s rational strategy would be to defend its decision as a response to the reprehensibility of the defendant’s conduct, and to say little more than that. Using this approach, the court would immunize itself from any effective review under *Philip Morris*. Moreover, the court would shield from view the actual decision process that led to the damage award.

As this example demonstrates, the predominant effect of *Philip Morris* is to reward trial courts for refusing to explain clearly the rationale for any punitive awards issued. Courts are encouraged by *Philip Morris* to use the language of morals rather than the language

of strategic deterrence and finance. Perhaps this is preferable, given that moral messages are often easily absorbed by the public, and especially among children. But the effect of providing this payoff structure to lower courts is that it denies higher courts an effective means of reviewing the punitive award on the basis of the concerns that motivated the *Philip Morris* majority. In other words, the very procedural aims sought by the court in *Philip Morris* are defeated by the decision. It is a wonderful example of unintended consequences. The Court, unwilling to think through the strategic implications of its decision, issues an opinion that produces the precise opposite of what it seeks.

I do not view Cardozo's *Palsgraf* opinion as a largely counterproductive exercise, as is the Supreme Court's *Philip Morris*. As I said before, I think Cardozo was successful in crafting a simple rule that helps to solve a recurring and messy class of problems in the proximate cause case law. It is at best a shortcut and pointer toward the right direction, because the difficult work of thinking through the analysis of intervening causal factors still remains to be done even in the cases in which the *Palsgraf* rule could be applied. But *Palsgraf* remains a useful shortcut, as well as a tool that expands the judge's ability to ensure predictability in the common law. These positive attributes I cannot see in the *Philip Morris* decision. It is a disservice to Cardozo to suggest that *Palsgraf* provides the intellectual foundation for *Philip Morris*.

In any event, in full recognition of the value of Cardozo's opinion in *Palsgraf*, I am still inclined to conclude that it falls short of providing a theoretical framework for all of tort law; it is suggestive of a broader theory, but no more than that. Moreover, to the extent that Zipursky and any other new private law scholars want to rely on *Palsgraf* to support their arguments, they must confront a fatal inconsistency. Zipursky and his colleagues want to shift the focus of tort law from foreseeability to duty. This makes sense, for them, because consequentialist theory is hinged on foreseeability of consequences, while nonconsequentialist theory starts from an identification of *a priori* duties. But Cardozo ties duty to foreseeability in *Palsgraf*, and in doing so remains well within the Holmesian framework. Perhaps there are some important judicial opinions that would support Zipursky's entire assemblage of propositions, but *Palsgraf* is not one of them.

I hope these critical comments do not obscure the vast areas in which Zipursky and I agree. As torts scholars, we have quite similar views of the topics that need to be addressed in teaching and in scholarship. I think the key difference is a matter of style; that is, whether one relies on the language of morals instead of the language of strategic deterrence. I have a preference for the latter paradigm because I find, within it, it is much easier to verify the relationship between expressed goals and likely results. I see no reason why there should not be room within the new private law theory for an approach that adopts this perspective.